UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of	)	
	)	Case 05-RC-108090
HCR MANORCARE, RUXTON,	)	
	)	
Employer	)	
	)	
and	)	
	)	
1199 SEIU UNITED HEALTH CARE WORKERS EAST,	)	
	)	
Petitioner	)	
	)	

PETITIONER'S ANSWERING BRIEF TO EMPLOYER'S EXCEPTIONS TO HEARING OFFICER'S REPORT AND RECOMMENDATION ON OBJECTIONS

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Petitioner, 1199 SEIU United Healthcare Workers East ("1199 SEIU" or "Union"), files this Answering Brief to Employer's Exceptions to the Hearing Officer's Report and Recommendation on Objections, filed on February 20, 2014.

1. BOARD PRECEDENT CONFIRMS THAT THE HEARING OFFICER SHOULD HAVE CONSIDERED THE EMPLOYER'S PRE-PETITION OBJECTIONABLE CONDUCT.

The Employer excepts to the Hearing Officer's finding that if the burden shifted, then the Employer failed to show that its decision to grant wage increases was motivated by legitimate business purposes unrelated to the Union's organizing campaign. Hearing Officer's Report and Recommendation on Objections ("HO Report") at 9, 14. The Employer states that the Hearing Officer improperly considered its pre-petition conduct in reaching that conclusion and relies on *Flamingo Las Vegas Operating Co.*, 360 NLRB No. 41 (Feb. 14, 2014) for the proposition that he was not permitted to do so.

The Employer acknowledges, however, that *Flamingo Las Vegas* does not hold that pre-petition evidence may never be considered in a representation proceeding. It merely rejected the broad argument advanced by the union that pre-petition conduct can generally be considered if it is part of an ongoing antiunion campaign. *Id.* slip op. at 4. Thus, *Flamingo Las Vegas* maintained the status quo: pre-petition conduct may be considered "insofar as it lends meaning and dimension to related post-petition conduct." *Id.*

It appears, therefore, that the parties agree. The question presented here is whether the Employer's pre-petition conduct—i.e. its hurried decision to grant a wage increase and its partial announcement of a forthcoming "market adjustment"—lends meaning and dimension to related post-petition conduct. On the facts of this case, the answer is yes. Such preemptive, unlawful

and objectionable conduct lends meaning and is *directly* related to the Employer's 1) post-petition continuation of the announcement of wage increases; 2) post-petition disclosure of the amount of wage increases and bonuses (including to 30% of employees who received an increase of $1.00 or more per hour); 3) post-petition payment of wage increases, retroactive pay and bonuses; and 4) post-petition PowerPoint presentation comparing employees' new wage rates with wage rates at nearby 1199 SEIU facilities that did not receive "market" wage increases and suggesting that such new wage rates would be placed at risk if employees unionized. *See* Petitioner's Brief in Support of Exceptions to Hearing Officer's Report and Recommendation on Objections. Accordingly, the Hearing Officer should have considered the Employer's pre-petition conduct for purposes of ruling on Objections 2, 3, 4 and 5.

Such conclusion is supported not only by the facts of this case, but also by *Parke Coal Co.*, 219 NLRB 546 (1975). In *Parke Coal,* the evidence adduced at the representation proceeding established that upon learning of employees' organizational activities, the employer made a pre-petition promise of higher wages and insurance benefits and at the same time told employees it would not run a union mine. *Id.* at 547. The Board held that such pre-petition statements "could not be specifically relied upon as grounds for objection to the election," (citing *Ideal Electric & Mfg. Co.*, 134 NLRB 1275 (1961)). However, the Board specifically relied on such statements, to evaluate whether the employer's post-petition promise of insurance benefits was made "in order to induce the employees to reject the Union." *Parke Coal,* 219 NLRB at 547. The Board likened the employer's dual promises to an *unlawful* acceleration of planned wage increases in response to a union's organizing drive, and concluded:

> The reaffirmance of the promise, we think, is no less objectionable than the original promise and has the same effect with respect to influencing the employees' determination as to whether they need representation or not.

Id. Thus, the Board rejected the Regional Director's conclusion that a post-petition promise could not be viewed as objectionable if it was consistent with a pre-petition promise, where such conclusion was reached without consideration of evidence establishing the illegitimate and unlawful objective of the pre-petition promise. *Id.*

Here, the Hearing Officer should have considered the Employer's unlawful and objectionable decision to grant wage increases, to accelerate the award of wage increases and to make wage increases retroactive, when he evaluated whether the employer's post-petition implementation and discussions of wage increases was objectionable.

2. THE FACT THAT THE EMPLOYER'S CONDUCT CONSTITUTES AN UNFAIR LABOR PRACTICE DOES NOT CLOAK SUCH CONDUCT WITH PROTECTION FROM CONSIDERATION IN A REPRESENTATION PROCEEDING, NOR DOES IT PRECLUDE CONSIDERATION OF MOTIVE.

The Employer argues that the sole question for consideration by the Hearing Officer was whether its conduct during the critical period was "coercive" and claims that the Hearing Officer was precluded from considering motive when resolving that question. Employer's Brief in Support of Exceptions at 7, 9. This argument ignores the Supreme Court's holding that a well-timed benefit impinges on employees' freedom of choice for or against unionization. *NLRB v. Exchange Parts*, 375 U.S. 405, 409 (1964) ("Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged."). It also ignores the Board's recognition that the analysis under *Exchange Parts* is motive-based irrespective of whether the conferral of benefits is alleged as a violation of the Act or as objectionable conduct. *Manor Care Health Servs.-Easton*, 356 NLRB No. 39, slip op. at 21 (2010); *AK Steel Corp.*, 317 NLRB 260 (1995) ("[A]n employer's

business justification for a particular grant of benefit is relevant, and motive is a logical part of that inquiry, i.e., whether the action was taken in order to influence the election."); *United Airlines Servs. Corp.*, 290 NLRB 954, 954 (1988) (ordering a representation hearing to determine the employer's motive for changing the payday, including it's motive for the timing of such change, and to determine whether the change in payday constituted a benefit reasonably calculated to influence the election results). *See also All Cnty Electric Co.*, 332 NLRB 863 (2000) (rejecting the suggestion that issues of motive may not be considered in representation proceedings and stating specifically that "it is quite common for the Board to consider questions of motive or intent in representation cases"); *B & D Plastics*, 302 NLRB 245, 245 (1991) (discussing factors considered in pre-election benefits cases, including 1) the size of the benefit *in relation to the stated purpose*, 2) the number of employees receiving it, 3) how employees would reasonably tend to view *the purpose* of the benefit, and 4) the timing of the benefit) (emphasis added).

Whether in an unfair labor practice or representation proceeding, in pre-election benefits cases "it is the Employer's motive that is at issue," *United Airlines Servs. Corp.*, 290 NLRB at 954. And, where the timing of the benefit coincides with organizing activity or a pending election, it is the Employer's burden to establish lawful motive. *Manor Care Health Servs.-Easton,* 356 NLRB slip op. at 21*; United Airlines Servs. Corp.*, 290 NLRB at 954.

Notwithstanding the above, the Employer claims here that *because* its pre-election conduct was unlawful, the Hearing Officer was foreclosed from considering it because no unfair labor practices were alleged. Such claim should be deemed waived because the Employer did not raise it during the hearing or in its post-hearing brief. It should also be rejected because it is inconsistent with the limited holding of *Texas Meat Packers*, 130 NLRB 279, 280, fn.2 (1961),

which does not stand for the broad proposition that objectionable conduct that also violates the Act cannot be considered in a representation proceeding.

The line of cases cited by the Employer begins with *Times Squares Stores,* 79 NLRB 361 (1948). In *Times Squares Stores,* the union challenged the ballots of replacement employees on the grounds that they were hired to replace unfair labor practice strikers. The Board held that resolution of the union's challenges required an "initial finding" of an unfair labor practice, and that such finding could only be made in an unfair labor practice proceeding pursuant to the statutory scheme which vests the General Counsel with final authority to issue complaints based on unfair labor practices. *Id.* at 365. Absent any unfair labor practice allegation by the Regional Director, the Board held that it was compelled to assume that the strike was an economic strike.

In *Texas Meat Packers,* the Board extended the reasoning of *Times Square Stores* to objections cases, but specifically stated that its holding would apply to "a very small minority of objections in representation cases . . . [involving] conduct innocent on its face and which can only be shown to have interfered with an election by an *initial finding* that an unfair labor practice has been committed." 130 NLRB at 280, fn.2 (emphasis added.) In that case, the union alleged that a layoff shortly before the election was unlawfully motivated. The Board held that it was required to assume otherwise absent "an initial finding that an unfair labor practice was committed." *Id.* at 280. In explaining the limitation of its holding, the Board stated,

> Of course it does not follow from this holding that conduct which may be found to be an unfair labor practice in the appropriate proceeding may never be considered in objections to elections cases. It is Board practice to set aside elections because of substantial interference therewith arising from conduct which, in an unfair labor practice proceeding, would also be held violative of the Act. But, in such cases, the interference with the election is found to exist without regard to whether the interfering conduct would be deemed an unfair labor practice in a complaint case. For the effect of preelection conduct on an election is not tested by the same criteria as conduct alleged by a complaint to violate the Act.

Id.

Both *Times Squares Stores* and *Texas Meat Packers* involved conduct alleged to violate § 8(a)(3) of the Act. Section 8(a)(3) states that employers shall not discriminate in regard to hire, tenure of employment or any term or condition of employment. 29 U.S.C. § 158(a)(3). In this case, the Employer's conduct presumptively violated § 8(a)(1) of the Act, which provides that an employer shall not "interfere with, restrain, or coerce employees" in the exercise of § 7 rights. 29 U.S.C § 158(a)(1). The reasoning of *Texas Meat Packers* cannot and should not be extended to objections cases such as this, involving § 8(a)(1) conduct, which is alleged to have interfered with employees' freedom of choice for or against unionization.[1] Such extension would be inconsistent with the majority's holding in *Texas Meat Packers* and would give birth to the undesirable results predicted by Member Fanning in his dissent:

> More disturbing to me, however, is the rule of general application to objections cases which the majority is enunciating here. It would be clear, albeit in error, were the majority to state that it will not consider objections to elections based on conduct which potentially constitutes unfair labor practices. Such a policy, although comprehensible, would give birth to two undesirable results. First, it would be a flagrant abdication of the Board's responsibility to the General Counsel to conduct elections under such conditions as will result in the free expression of the employees' will, under the guise that the statute demands such delegation. Secondly, it would eliminate the objections procedures. By far the overwhelming majority, if not essentially all, of the objections in representation cases is based upon conduct potentially constituting unfair labor practices. Objections would be required to be converted into unfair labor practice cases with the consequent delay and expense involved in an unfair labor practice procedure—that is, charges, complaints, hearings before Trial Examiners, exceptions to the Board, etc.

Id. at 281.[2]

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[1] The Employer cites *E.A. Nord Co.*, 276 NLRB 1418 (1985), for the proposition that the Board has already "sustained" the application of *Texas Meat Packers* in a wage increase case. Employer's Brief in Support of Exceptions at 11. However, in *E.A. Nord* Board specifically stated that it was adopting the Administrative Law Judge's dismissal of the union's objection pro forma because the union did not file exceptions. *Id.* at 2.

[2] This case can also be distinguished by the fact that the union elected to withdraw its unfair labor practice charge,

To the extent the Board concludes that *Texas Meat Packers* does preclude consideration of the Employer's pre-election unfair labor practices in this case, 1199 SEIU urges the Board to overrule *Texas Meat Packers* for the reasons stated by Member Fanning.

3. BOARD PRECEDENT AND THE RECORD IN THIS CASE REQUIRE A FINDING THAT THE EMPLOYER WAS AWARE THAT MOTIVE WAS AT ISSUE AND THAT IT LITIGATED THE ISSUE OF MOTIVE.

Finally, the Employer argues that the burden never shifted and if it did, the record should be re-opened to give the Employer a second opportunity to submit evidence establishing the business purpose served by its pre-election announcement and award of wage increases and bonuses. Such request should be denied.

For the reasons discussed in Petitioner's Brief in Support of Exceptions, the Employer's claim and the Hearing Officer's conclusion—that the burden never shifted—rests on an improper application of *Kokomo Tube Co.*, 280 NLRB 357 (1986). The Hearing Officer's post-hearing conclusion does not justify the Employer's failure to present evidence at the hearing. Nor does the Employer's reliance on its own conclusion that *Kokomo* applied. Particularly given the Hearing Officer's denial of the Employer's motion to dismiss at the conclusion of Petitioner's case. Tr. 229-31. If true, that the Employer did not submit all of its proof, such decision was not made in reliance on *Texas Meat Packers* given the Employer's belated invocation of the holding therein.

Given the case law cited in Sections 1 and 2 above, the Employer proceeded at its own risk and it cannot blame Board precedent for its failure to submit evidence it knew and should have known was relevant to the question whether its promise and conferral of benefits

constituted objectionable conduct. *See Kingspan Insulated Panels, Inc.*, 359 NLRB No. 19 (2012) (post-petition implementation of pre-petition promise of a shift differential was objectionable); *United Airlines Servs. Corp.*, 290 NLRB at 954 (it is the employer's burden to come forward with an explanation, other than the pending election, for the timing of a promise or benefit).

Where, as here, the Employer submitted substantial evidence of its alleged lawful motive and made argument on the issue of motive in its post-hearing brief, it has no due process complaint. The Employer called John Kolesar, HCR Manor Care's Area Human Resources Director for the Eastern Division, as a witness for the very purpose of attempting to explain the business reason for its pre-election conferral of wage increases and bonuses. Kolesar offered his understanding of the Employer's policies and procedures for conducting "market wage analyses" and "market wage adjustments." The Employer offered multiple exhibits in relation thereto. Given this record, there is no support for the Employer's asserted belief that it was not required to prove lawful motive at the hearing. In fact, the record supports a conclusion that the Employer knew well before the hearing that motive would be *the* issue and that the Employer would need to present proof that the conferral of wage increases, including the timing of such conferral, was motivated by a business purpose other than the anticipated election. *See Manor Care Health Servs.-Easton*, 356 NLRB No. 39 (2010).

CONCLUSION

For the reasons set forth herein and in Petitioner's Brief in Support of Exceptions, 1199 SEIU requests that the Board overrule the Employer's exceptions and set aside the election results.

Dated: February 27, 2014

Respectfully submitted,

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Certificate of Service

Petitioners' Brief in Support of Exceptions is being electronically filed today (February 27, 2014) with the Executive Secretary of the National Labor Relations Board. Copies of this submission have been served today via email on counsel for all other parties, as follows:

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